

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

Susan Rego,

Complainant,

vs.

94 West Business Center LLC, DAC
Development LLC, Erik Paulsen, and
Friends of Erik Paulsen,

Respondents.

ORDER OF DISMISSAL

The above-entitled matter¹ came on for a probable cause hearing as provided by Minn. Stat. § 211B.34, before Administrative Law Judge Manuel Cervantes on October 24, 2008, to consider a complaint filed by Susan Rego on October 21, 2008. The probable cause hearing was conducted by telephone conference call.

Susan Rego, [Street Address Redacted], St. Michael, MN 55376, participated on her own behalf. David Lenhardt, Attorney at Law, Gries & Lenhardt, PLLP, 12725 43rd Street, NE, St. Michael, MN 55376, participated on behalf of Respondents 94 West Business Center LLC and DAC Development LLC. Thomas Emmer, Attorney at Law, Emmer Law Firm, P.A., P.O. Box 650, Delano, MN 55328, participated on behalf of Respondents Erik Paulsen and Friends of Erik Paulsen.

Based on the record and all the proceedings in this matter, and for the reasons stated in the attached Memorandum, the Administrative Law Judge finds that the complaints are within the jurisdiction of the FEC and are not properly before the Office of Administrative Hearings.

ORDER

IT IS HEREBY ORDERED THAT:

The Complaints filed by Susan Rego against Respondents 94 West Business Center LLC, DAC Development LLC, Erik Paulsen, and Friends of Erik Paulsen are DISMISSED. The Respondents' request for attorney's fees is DENIED.

Dated: October 31, 2008

/s/ Manuel J. Cervantes
MANUEL J. CERVANTES
Administrative Law Judge

¹ This matter began as three separate complaints by Susan Rego: one against 94 West Business Center LLC, one against DAC Development LLC, and one against Erik Paulsen and Friends of Erik Paulsen. The complaints were consolidated by an Order Joining Related Complaints issued on October 30, 2008.

NOTICE OF RECONSIDERATION AND APPEAL RIGHTS

Minnesota Statutes § 211B.34, subdivision 3, provides that the Complainant has the right to seek reconsideration of this decision on the record by the Chief Administrative Law Judge. A petition for reconsideration must be filed with the Office of Administrative Hearings within two business days after this dismissal.

If the Chief Administrative Law Judge determines that the assigned Administrative Law Judge made a clear error of law and grants the petition, the Chief Administrative Law Judge will schedule the complaint for an evidentiary hearing under Minnesota Statutes § 211B.35 within five business days after granting the petition.

If the Complainant does not seek reconsideration, or if the Chief Administrative Law Judge denies a petition for reconsideration, then this order is the final decision in this matter under Minn. Stat. § 211B.36, subd. 5, and a party aggrieved by this decision may seek judicial review as provided in Minn. Stat. §§ 14.63 to 14.69.

MEMORANDUM

The Complaint alleges that Respondents 94 West Business Center LLC and DAC Development LLC violated the prohibition against corporate contributions in Minn. Stat. § 211B.15, subd. 2, by posting campaign lawn signs promoting the election of Norm Coleman for U.S. Senate and Erik Paulsen for U.S. House of Representatives.² The Complaint further alleges that Respondents Erik Paulsen and his registered campaign committee, Friends of Erik Paulsen, violated Minn. Stat. § 211B.13, subd. 2, by knowingly accepting prohibited campaign contributions from Respondents 94 West Business Center LLC and DAC Development LLC.

Minn. Stat. § 211B.15, subd. 2, prohibits corporations from making contributions, directly or indirectly, to an individual to promote the individual's candidacy or election to political office. The statute defines "corporation" to mean: "(1) a corporation organized for profit that does business in this state; (2) a nonprofit corporation that carries out activities in this state; or (3) a limited liability company formed under chapter 322B, or under similar laws of another state, that does business in this state."³

Subdivision 11 of Minn. Stat. § 211B.15 provides an exception to the general prohibition against corporate campaign contributions found at Minn. Stat. § 211B.15, subd. 2. It allows corporations to post messages on their premises that promote voter participation provided that the messages are not controlled by or operated for the advantage of a particular candidate or political party. The

² The Complaint also states that there is a sign promoting John McCain for President, however, Minnesota Chapter 211B does not govern campaign practices related to candidates for president and vice-president of the United States. See, Minn. Stat. § 211B.01, subd. 3.

³ Minn. Stat. § 211B.15, subd. 1 (2008).

statute is written in the negative, but it implies that it is a violation for corporations to post messages that promote participation in elections if the messages are controlled by or operated for the advantage of a candidate.

Minn. Stat. § 211B.13, subd. 2, prohibits a person from knowingly accepting or receiving money or anything of monetary value that is a prohibited corporate disbursement under section 211B.15.

By Order dated October 23, 2008, the Administrative Law Judge found that the Complainant established prima facie violation of Minn. Stat. §§ 211B.13, subd. 2, and 211B.15, subd. 2. A probable cause hearing was held by telephone on October 28, 2008.

The purpose of a probable cause hearing is to determine whether there are sufficient facts in the record to believe that a violation of law has occurred as alleged in the complaint.⁴ The Office of Administrative Hearings looks to the standards governing probable cause determinations under Minn. R. Crim. P. 11.03 and by the Minnesota Supreme Court in *State v. Florence*.⁵ The purpose of a probable cause determination is to answer the question whether, given the facts disclosed by the record, it is fair and reasonable to require the respondent to go to hearing on the merits.⁶ If the judge is satisfied that the facts appearing in the record, including reliable hearsay, would preclude the granting of a motion for a directed verdict of acquittal, a motion to dismiss for lack of probable cause should be denied.

Respondents Erik Paulsen and Friends of Erik Paulsen

Respondents Erik Paulsen and Friends of Erik Paulsen request dismissal of the Complaint as against them on three grounds. First, Respondents Paulsen and Friends of Erik Paulsen argue that because Mr. Paulsen is a candidate for federal office, the Federal Election Campaign Act (FECA) governs this matter and preempts state regulation.

The FECA regulates campaign contributions to candidates for federal office and expenditures made by those candidates.⁷ Corporate contributions to candidates for federal office are governed by 2 U.S.C. § 441b, which provides, in part, as follows:

It is unlawful for any . . . corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election at which . . . a . . . Representative in . . . Congress [is] to be voted for . . . or other person knowingly to accept or receive any contribution prohibited by this section, or any officer or any director of any corporation . . . to consent to any contribution or expenditure by the corporation . . . prohibited by this section.

⁴ Minn. Stat. § 211B.34, subd. 2.

⁵ 239 N.W.2d 892 (Minn. 1976); see also Black's Law Dictionary 1219 (7th ed. 1999) (defining "probable cause" as "[a] reasonable ground to suspect that a person has committed or is committing a crime.")

⁶ *Id.*, 239 N.W.2d at 902.

⁷ See, 2 U.S.C. §§ 431-457 (2008).

The Act further provides:

The provisions of this Act, and of rules prescribed under this Act, supersede and preempt any provision of State law with respect to election to Federal office.⁸

Additionally, the regulations of the Federal Election Commission (FEC) specify the types of state laws which are preempted by the FECA:

Sec. 108.7 Effect of State law (2 U.S.C. 453).

(b) Federal law supersedes State law concerning the . . . (3) limitation on contributions and expenditures regarding Federal candidates and political committees.⁹

In *Weber v. Heaney*,¹⁰ the Eighth Circuit Court of Appeals voided on preemption grounds certain amendments to Minnesota Statutes Chapter 10A (entitled the “Congressional Campaign Reform Act”), which purported to apply contribution limits on candidates for federal office. The Court held that “under every plausible reading of § 453, the Campaign Reform Act falls squarely within the boundaries of the preempted domain.”

Respondents Paulsen and his campaign committee argue that to the extent that Minn. Stat. § 211B.15 purports to regulate contributions to candidates for federal office by prohibiting corporate contributions, such provisions are preempted by the FECA. As a result, the Respondents assert that the OAH has no jurisdiction over these claims as any such claims are properly within the jurisdiction of the FEC.

There is a strong presumption in the law against preemption that may only be overcome by an explicit or implicit manifestation of congressional preemptive intent.¹¹ Moreover, the explicit preemption in the FECA has been narrowly construed by the federal courts, leaving open some areas for state regulation.¹² It has been held, for example, that the FECA should not be read so broadly as to preempt state or local ethics laws,¹³ or laws prohibiting false registration or voting fraud.¹⁴ The United States Supreme Court has recognized that states have a substantial interest in regulating the conduct of elections if those elections are to be fair, honest and orderly.¹⁵

In this case, however, the state statute that Respondent Paulsen and his committee are alleged to have violated relates to contributions to candidates. As

⁸ 2 U.S.C. § 453.

⁹ 11 C.F.R. § 108.7(b).

¹⁰ 995 F.2d 872, 875 (8th Cir. 1993).

¹¹ *State v. Jude*, 554 N.W.2d 750, 752 (Minn. 1996), citing *Weber v. Heaney*, 995 F.2d 872, 875 (8th Cir. 1993).

¹² *Id.* See also, *Reeder v. Kansas City Bd. of Police Comm’rs*, 733 F.2d 543, 545 (8th Cir. 1984) (FECA preemption statute is not so clear as to preclude consideration of legislative history as to scope of preemption.)

¹³ See generally, *Stern v. General Elec. Co.*, 924 F.2d 472, 474 (2nd Cir. 1991).

¹⁴ *Weber v. Heaney*, 995 F.2d 872, 876 (8th Cir. 1993).

¹⁵ *Storer v. Brown*, 415 U.S. 724, 730, 94 S.Ct. 1274, 1279, 39 L.Ed.2d 714 (1974).

such, it appears to fall squarely within the preemptive reach of the FECA. As the legislative history of section 453 shows, the central aim of the clause is to make certain that Federal law occupies the field providing a comprehensive, uniform federal scheme that is the sole source of regulation of campaign financing, including contribution limitations, for election to federal office.¹⁶

For this reason, the Administrative Law Judge concludes that because Respondent Paulsen is a candidate for federal office, the complaint regarding his alleged acceptance of a prohibited corporate contribution is within the jurisdiction of the FEC and not properly before the Office of Administrative Hearings. The consolidated complaints in this matter are dismissed as against Respondents Erik Paulsen and Friends of Erik Paulsen.

Moreover, even if this matter was properly before this tribunal, the Complainant failed to put forward any evidence that Respondents Paulsen or Friends of Paulsen *knowingly* accepted a prohibited corporate contribution. It is not enough that the lawn signs promoting Mr. Paulsen's campaign are located on corporate property. In order to establish probable cause that Respondent Paulsen and his campaign committee violated Minn. Stat. § 211B.13, subd. 2, the Complainant must come forward with some evidence that the alleged violation was done knowingly. There is no evidence in the record that Respondent Paulsen or his committee "knowingly" received something of monetary value from a corporation in violation of Section 211B.13. Accordingly, dismissal of the Complaint would likewise be proper on this ground.

The Respondents have requested an award of fees and expenses under Minn. Stat. § 211B.36(3). This statute allows the assigned Administrative Law Judge to order a complainant to pay the respondent's reasonable attorney's fees and costs of the Office of Administrative Hearings as a sanction if the judge determines the complaint was frivolous. The Complaints are not frivolous. Respondents' request for attorney's fees and costs is denied.

Respondents 94 West Business Center LLC and DAC Development LLC

The Complaint alleges that both Respondent 94 West Business Center LLC and DAC Development LLC are "corporations" as defined in Minn. Stat. § 211B.15, subd. 1, and that both violated Minn. Stat. § 211B.15, subd. 2, by posting campaign signs promoting the candidacies of Norm Coleman and Erik Paulsen.

The Administrative Law Judge concludes that the FECA also limits the OAH's jurisdiction with respect to allegations of prohibited corporate contributions to federal candidates. Again, the Act explicitly preempts state law concerning limitations on contributions to candidates for federal office. Therefore, the Administrative Law Judge concludes that because Respondent Paulsen and Norm Coleman are candidates for federal office, the allegations regarding Respondents 94 West Business Center and DAC Development's prohibited corporate contributions are within the jurisdiction of the FEC and not properly before the Office of Administrative Hearings.

¹⁶ H.R. Rep. No. 93-1438, 93rd Cong., 2d Sess. 69 (1974).

The consolidated complaints in this matter are dismissed in their entirety.

M.J.C.